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No. 99-633

IN THE
Supreme Court of the United States

C. W. ROEN CONSTRUCTION CO.,
BRUCE A. ROEN and JERALDINE C. BREAULT,
Petitioners,

v.

UNITED STATES OF AMERICA,
ex rel. PLUMBERS AND STEAMFITTERS
LOCAL UNION NO. 38
and LAWRENCE J. MAZZOLA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

(Relating to Petitioners' Question 1)

The False Claims Act imposes liability for "knowingly" presenting false claims for contract payment. To receive payments on federally-funded construction projects, contractors must certify that they have properly classified and paid their workers. C.W. Roen deliberately violated a Department of Labor determination requiring that certain work be classified and paid at Steamfitter wage rates. It paid its employees at a lower rate, and then certified that they had been properly classified and paid. Did the Ninth Circuit correctly decide that C.W. Roen's scienter was sufficient for False Claims Act liability?

QUESTIONS *NOT* PRESENTED

(Relating to Petitioners' Questions 2 and 3)

This case does not present the second and third questions proffered by the petition, because the factual predicate on which they depend does not exist. Here DOL issued both a general wage decision that determined prevailing *wage rates* for the county where the work was performed, and a specific *classification* determination that prescribed which of those rates were to be paid for the work in issue here.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners ask the Court to invest its time and effort in deciding whether a contractor who deliberately violates a DOL classification determination, and then lies about it, has scienter under the False Claims Act. The petition identifies no conflict between Circuits and no question of national importance. Instead, it relies on pejorative characterizations and misstatements of fact and law. As the Court will readily see, this case does not merit its attention.

Aside from its utter failure to show any reason why review should be granted, the petition is most

noteworthy for its numerous mischaracterizations and misstatements of the record. For example:

- The petition attempts to portray this case as an inter-union jurisdictional dispute, an attempt to force the reassignment of work from one union to another. It is not. This case involves only the proper wage rate to be paid to C. W. Roen's employees, not their union affiliation.

  The petition goes so far as to describe the Complaint as stating that "such work should properly have been assigned to plumbers and steamfitters." [1] In fact, the Complaint does nothing of the sort.[2] The petition also argues that "Roen would have exposed itself to a breach of contract claim by the [Laborers' Union] if it had assigned the disputed work to UA members." [3] Yet defendants are well aware that under the Davis-Bacon Act, employers are not required to assign work to any particular union; they need only pay their workers the appropriate wage rates. Thus, Roen could have continued to use Laborers to perform the disputed work, as long as it paid them the proper Steamfitter wage rate.

  These misstatements are a transparent attempt to shift attention from the real issues in this case. They underscore the petition's lack of substance.

- The petition states repeatedly that the Department of Labor has not made any classification determination for the work in issue here.[4] This

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[1] Petition, p. 10, citing Complaint, ¶ 14.

[2] See Complaint, ¶ 14 (Appendix A hereto).

[3] Petition, p. 7.

[4] Petition, pp. i, 10 n.3, 14-15, 18, 23, 27.

is simply not true. The DOL District Director issued classification determinations covering this very work on January 18, 1994 and March 11, 1996.[5] The Ninth Circuit held that these were classification determinations,[6] and defendants have never offered evidence to the contrary. There is absolutely no basis for the assertion that no classification determination has been made.

- After stating that no classification determination has been made for this work, the petition claims that both the Ninth Circuit and plaintiffs "agree" that DOL has "withdrawn" those determinations.[7] This is untrue. The Ninth Circuit opinion simply describes subsequent letters from DOL, finding that they had no effect on the certainty of the DOL's classification determination during the period in question here.[8] Furthermore, plaintiffs' evidence showed that the District Director was fully authorized to make these classification determinations, while defendants presented no evidence that other DOL personnel could overrule or "withdraw" such a determination. In short, it is far from "agreed" that the classification determinations here have been "withdrawn."
- Defendants quote extensively from the Ninth Circuit's opinion in *U.S. ex rel. Plumbers and Steamfitters v. Dan Caputo Co.*,[9] arguing that under *Caputo* the court must defer to DOL on

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[5] CR 31, Tab 3 (Appendix B hereto); CR 31, Tab 26 (Appendix C hereto).

[6] 183 F.3d at 1090-1091, 1094.

[7] Petition, pp. 12, 16.

[8] 183 F.3d at 1094.

[9] 152 F.3d 1060 (9th Cir. 1998).

wage rate and classification determinations.[10] But the petition fails to point out that deferral in *Caputo* was *explicitly* premised on the fact that DOL had promised the court that it would make a determination for the project in issue within a short period of time, and it requested the opportunity to do so.[11] Lest its decision be overread, the Ninth Circuit cautioned in *Caputo* that "to invoke the doctrine of primary jurisdiction on an issue that an agency may never decide would postpone the resolution of the Union's claim indefinitely."[12] This is exactly the situation in the instant case, for here DOL has stated that it has no plans to conduct an area practice survey—a point the petition fails to mention as it attempts to show a conflict between this opinion and *Caputo*.

- Defendants rely on the "unrebutted" declaration of Richard Cheung for the proposition that the classification determinations here were erroneous, and that an area practice survey is necessary for determining classifications under the Davis-Bacon Act.[13] In fact, Mr. Cheung's declaration was thoroughly rebutted; it was shown to be false in both of its major contentions.[14]

Even with these mischaracterizations, defendants have not offered a "compelling reason," as required by Supreme Court Rule 10, to support a grant of certiorari here. The petition should therefore be denied.

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[10] Petition, pp. 21-23.

[11] 152 F.3d at 1062.

[12] *Id.*

[13] Petition, pp. 26-27.

[14] Plaintiffs' Opening Brief on Appeal, pp. 31-35; Plaintiffs' Reply Brief on Appeal, pp. 11-15.

REASONS THE PETITION SHOULD BE DENIED

The petition offers no grounds whatever for review by this Court. Nowhere does it argue that the Ninth Circuit opinion conflicts with opinions of this Court or another circuit court. Nor does it present—or even claim to present—an important question of federal law. Moreover, defendants cannot even demonstrate that the Ninth Circuit's opinion is erroneous. Accordingly, the petition should be denied.

I. THE PETITION DOES NOT SHOW ANY CONFLICT THAT THIS COURT SHOULD RESOLVE.

Under Supreme Court Rule 10(a), this Court may grant review of a circuit court decision where it conflicts with that of another circuit court or a state court of last resort. The petition does not allege such a conflict here.

Instead, it argues that the Ninth Circuit's opinion creates an *intra*-circuit conflict, saying that the court's holding diverges from earlier language used by the Ninth Circuit in False Claims Act cases.[15] Even if this were true, an intra-circuit conflict should be resolved by the Ninth Circuit itself; it is not a basis for granting certiorari.[16]

Moreover, there is no intra-circuit conflict here. As explained by the opinion in this case, the court of appeals did not change the definition of "knowingly" under the False Claims Act. Instead, it harmonized earlier Ninth Circuit dicta with the language of the

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[15] Petition, pp. 8-9, 16-17.

[16] Stern and Gressman, *Supreme Court Practice, 7th Ed.* (BNA 1993), pp. 176-77; see also *Davis v. United States*, 417 U.S. 333, 340, 41 L.Ed.2d 109, 94 S.Ct. 2298 (1974).

statute itself.[17] The court's holding in this case was grounded firmly and explicitly in the statutory language; the court merely disapproved previous dicta—but *not* case holdings—which seemed to depart from that language.[18]

Defendants argued vigorously in their petition for rehearing *en banc* that the panel's opinion created an intra-circuit conflict. Under Federal Rule of Appellate Procedure 35, a principal purpose of *en banc* review is "to secure or maintain uniformity of the court's decisions." Yet no Ninth Circuit judge, not even the judge who dissented from the panel decision here, voted to re-hear this case *en banc*. Clearly, no intra-circuit conflict exists.

The only other "conflict" the petition asserts is with the Eastern District of Virginia's opinion in *U.S. ex rel. Windsor v. DynCorp*.[19] The two holdings do not conflict, however, since their underlying facts are distinguishable. Here, because DOL had issued clear, unequivocal classification determinations, and because defendants received and ignored them, the Ninth Circuit held that defendants' statements of compliance could constitute false claims under the Act.[20] In *DynCorp*, by contrast, no relevant classification determinations had been made. The district court ruled that DOL would have to make such a determination before a False Claims Act violation could be found.

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[17] 183 F.3d at 1092-93.

[18] *Id.*

[19] 895 F. Supp. 844 (E.D. Va. 1995).

[20] 183 F.3d at 1094-95. Defendants' statements of compliance certified that they had paid their employees the wage rates applicable to their work.

Thus, the facts and holding of *DynCorp* are entirely distinguishable from the instant case. There is no conflict.

In short, defendants have failed to show any conflict that would warrant this Court's review under Supreme Court Rule 10. Defendants cannot even show an intra-circuit conflict, which in any event should be resolved by the Ninth Circuit itself, not by this Court. Clearly, the opinion creates no conflict to justify a grant of certiorari.

II. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION OF FEDERAL LAW.

In addition to its failure to show any conflict which requires this Court's resolution, the petition likewise fails to show—or even assert—that any important question of federal law is at stake here.[21] Nowhere does it argue or analyze why the issues here might be "important" to federal law. Absent such a showing, this Court should refuse to grant certiorari.

III. THE CASE WAS CORRECTLY DECIDED BY THE NINTH CIRCUIT.

As is shown above, the petition does not meet any criterion for certiorari under Supreme Court Rule 10. In addition, it does not even show that the Ninth Circuit's opinion is erroneous. For this reason as well, the petition should be denied.

The petition's primary argument (although not presented as an "important federal question") is that DOL, and not the district court, should make the relevant wage rate and classification determinations under the Davis-Bacon Act. This is a straw man,

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[21] Supreme Court Rule 10(c).

however, because here DOL *did* make the relevant classification determinations.[22]

Contrary to defendants' claims, here the Ninth Circuit did not decide whether district courts should make classification determinations under the Davis-Bacon Act. Instead, it held that area practice surveys are not the only way to make such determinations.[23] Under the long-established DOL rule stated in *Matter of Fry Bros.*,[24] the court held that classification determinations can be based on collective bargaining agreements that contain prevailing wage rates. Because that was the method used by DOL in this case, the Ninth Circuit found that the classification determinations were valid, even without an area practice survey.[25]

Much of the petition is devoted to arguing that district courts should not act as administrative agencies, that they do not have the resources or the expertise of a federal agency, and that they are not authorized to make classification determinations under the Davis-Bacon Act. But these are not questions presented here. And none of these results can flow from the Ninth Circuit's opinion, for it decides only the effect of classification determinations *made by DOL* under its own *Fry Bros.* methodology. The district court can use these determinations in making its decision under the False Claims Act.

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[22] In January 1994 and again in March 1996. (CR 31, Tab 3, Appendix B; CR 31, Tab 26, Appendix C.)

[23] 183 F.3d at 1093-94.

[24] Case No. 76-6, U.S.D.O.L. Wage Appeals Board (1977).

[25] 183 F.3d at 1093-94.

The petition also argues that there can be no liability for false claims where the "factual predicate for establishing falsity has been removed." [26] Defendants claim that DOL's classification determinations cannot be the basis of a false claim, since subsequent letters from DOL personnel have rendered them "inoperative." But the effectiveness of the subsequent DOL letters is very much in question.[27] Whatever the letters' effect after they were written, the Ninth Circuit correctly held that they could not have had any effect on the certainty of the DOL's classification determinations *before* they were written.[28] Accordingly, because defendants defied a clear DOL directive at the time they submitted their false certifications, they can be held liable under the False Claims Act. This issue, too, was correctly decided by the Ninth Circuit.[29]

CONCLUSION

The petition presents no issues which deserve this Court's review. The Ninth Circuit's opinion has not created any conflict, let alone a conflict meriting a grant of certiorari. Nor has it decided any important national questions which would warrant this Court's review. Finally, the petition does not even show that the opinion was erroneous.

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[26] Petition, p. 27.

[27] Plaintiffs' Opening Brief on Appeal, pp. 31-35.

[28] 183 F.3d at 1094.

[29] In their Summary of Argument (p. 15), defendants also argue that the United States was not damaged by their false claims. This issue is not included in the Questions Presented and was not raised in the Ninth Circuit. Accordingly, it should not be considered here. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970).

For all of these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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